Supreme Court, U.S.
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# NO. 92-803

## In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM R. SPEACHT,
Petitioner,

vs.

MOBIL CHEMICAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## LIST OF PARTIES AND CORPORATE AFFILIATIONS

The Petitioner in this proceeding is William R. Speacht, who was Plaintiff in the court below. The Respondent is Mobil Chemical Company, who was Defendant in the court below. In accordance with Rule 29.1 of the Rules of the Supreme Court, Respondent discloses that it is a division of Mobil Oil Corporation, which is a subsidiary of Mobil Corporation.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondent, Mobil Chemical Company, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed in this proceeding on October 28, 1992, be denied.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the statutes and rules set forth in the Petition, this case involves the Seventh Amendment to the United States Constitution, which provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 49(b) provides:

> **General Verdict Accompanied By Answer To Interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and the answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Fed. R. Civ. P. 51 Provides:

> **Instructions To Jury: Objection.** At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

## STATEMENT OF THE CASE

Petitioner's Statement of the Case contains several significant misstatements and omissions concerning the record in this case, which Respondent Mobil has attempted to clarify below. As stated in the Petition, this is an employment discrimination suit pursuant to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 621 *et seq.* (ADEA). Petitioner William R. Speacht, who was plaintiff below, pursued a rather unusual theory of liability under the ADEA. Speacht never alleged that he was "fired" by Mobil; rather his theory was that he was involuntarily forced into a disability retirement, in a manner that constituted a "constructive discharge," by virtue of Mobil placing conditions on the performance of his job which allegedly were impossible to meet given Speacht's medical condition. The alleged motivation for this action was that it was part of a program

aimed at reducing the size and cost of Mobil's sales force by eliminating its older sales representatives. Mobil responded to the complaint by not only denying that it had engaged in any unlawful discrimination, but also by raising a specific affirmative defense that Speacht had not filed a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC) as required by Section 7(d) of ADEA, 29 U.S.C. Section 626(d).

The action proceeded to a four-day jury trial before the Honorable L. Clure Morton (sitting by designation) in March of 1990. Shortly before trial, in a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and again during trial in a motion for directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, Mobil again raised the issue that Speacht's charge was untimely. Both motions were denied. However, at the conclusion of the trial and after deliberations by the jury, the jury announced that it was hung, and the district court declared a mistrial.

The action was reset for a jury trial which took place during April, 1991 before the Honorable Jane Restani (again sitting by designation). At the trial, the evidence revealed that Speacht worked as a sales representative for the Design Products division of Mobil, which was based in Macedon, New York. Design Products manufactures and sells bread bags to various customers in the baking industry throughout the United States. In August, 1985, Speacht transferred from his sales position in Connecticut to a sales representative position in a newly created territory in Jacksonville, Florida. However, things did not go particularly well for Speacht after transferring to his new position. In January, 1986, Sid Smith, national accounts manager and Speacht's superior, sent Speacht a memorandum complaining that Speacht had been "camped in

Jacksonville," not adequately covering and developing his new territory, and that he was "unimpressed with [Speacht's] new 'start' in the South." Thereafter, Speacht had a number of additional disagreements, both written and oral, with his superiors, over the issues of territory coverage, the necessity of various written reports, and other philosophical issues as to how the territory should be handled.

Finally, in June, 1986, in response to a very critical memorandum from his immediate supervisor, Sid Helms, Mobil's district manager based in Atlanta, Sceacht raised the issue of his physical ability to cover the territory, and referred to his high blood pressure and prior heart surgery he had undergone in 1982. Speacht stated that "driving long distances certainly *now* tires me greatly, making it a little *dangerous* for me and Mobil to drive alone," and that his wife was accompanying him on longer trips "to assist with the driving." (First emphasis in original, second emphasis added). This was the first time that Speacht had ever asserted, before or after his transfer to Jacksonville, that any physical limitations prevented him from performing his new job. After a consultation with Mobil physician Dr. Jack Kerns, who was based at the Company's headquarters in Macedon, New York, Dr. Kerns placed Speacht on temporary disability until his private cardiologist in Jacksonville was able to change his blood pressure medication, which had been causing Speacht light-headedness and dizziness, and had been interfering with his ability to drive longer distances. After the blood pressure medication was changed, Speacht was released to return to work in early September, 1986.

Approximately a month later, in October, 1986, Speacht was again placed on temporary disability. This second period of disability followed an examination by Dr.

Kerns, during which Speacht reported a recent episode of vertical diplopia (or double vision), and also stated that he was not able to physically exceed 60 to 70 miles of driving. During this period of disability, in November, 1986, Speacht wrote a letter to Mobil management accusing his supervisor (Sid Helms) of "directing and orchestrating a campaign to have [him] placed on long-term disability. . . ." However, during this period, Speacht was referred by his Jacksonville cardiologist to a neurologist, who, after performing a battery of tests, could not find a specific cause for Speacht's episode of double vision, but suspected that he may have had a "transient ischemic event" (temporary lack of blood to his brain). Thereafter, in late November, 1986, Speacht's cardiologist wrote a letter to Dr. Kerns releasing Speacht "to return to work and to drive his car," and placed "no specific limitations" on him.

On December 12, 1986, after Speacht was also examined and released by Dr. Kerns, Speacht had a meeting with his supervisors (Sid Helms and Gary Ganaway) and with Mobil's employee relations manager to review his 1986 performance evaluation, and to discuss the performance problems he had had prior to his periods of temporary disability. During this meeting, Speacht was advised that his performance had not been satisfactory, and that he was receiving an overall appraisal of "FM" (fails to meet job requirements). He was also presented with a set of short-term objectives, which were mandatory job requirements designed to improve his performance, and which also are the objectives that Speacht has alleged throughout this action were impossible to meet. Such short-term objectives were automatic under Mobil policy upon assessment of an "FM" appraisal. Speacht testified that he understood that the "FM" appraisal meant that he had done "a very, very poor job," that "you're subject to lose you job," and that he was very upset when he saw the "big glaring 'FM' star-

ing [him] in the face."

It is undisputed that Speacht never attempted to meet the short-term objectives, and never performed any work as sales representative after the December 12, 1986 meeting. Shortly thereafter, Dr. Kerns received a letter from Speacht's cardiologist dated December 18, 1986, stating that he was of the opinion that Speacht could not fulfill the requirements of his job (as specified in the short-term objectives) "due to his medical condition" and that he was advising Speacht to seek "*medical retirement* on disability." (Emphasis added).

Accordingly, Speacht again returned to a disability status in December, 1986. Under Mobil's policy, he was required to exhaust his short-term disability benefits before he was eligible to obtain long-term disability benefits . In August, 1987, Speacht applied for long-term disability benefits, and obtained a certification from his physician that he was permanently disabled. At this time, he also filed an application seeking social security disability benefits.

On September 1, 1987, Speacht met with a Mobil employee relations manager and with a benefits specialist to review his application for long-term disability benefits and to go over his benefit options. It was during this meeting that Speacht inquired whether Mobil had any other jobs available for him. After this meeting, Speacht wrote a letter to the Company in which he stated, "Also, I want to confirm for Social Security Interview - that no other job or position was extended to me - correct?" Speacht's application for long-term disability benefits was approved, and he began drawing benefits in the amount of $1,933 per month from September 15, 1987 through the date of trial.

During the trial, and at the conclusion of Plaintiff's case, Mobil moved for a directed verdict on the ground that, given Speacht's theory in this case, his EEOC charge was untimely filed. The Company also had asserted this issue in its trial brief filed before trial, and had included it as an issue to be resolved in the joint pretrial stipulation. The district judge denied Mobil's motion for directed verdict, but stated that she was "interested" in the timeliness argument, and that perhaps the jury should resolve the factual issue". . .that if there was a constructive discharge, when did it occur."

It was only after the above sequence of events that the district judge, at the jury charge conference, proposed a special interrogatory on the timeliness issue, and an additional instruction addressing this question. Accordingly, to suggest that the district court raised this issue *sua sponte,* as Speacht does in his Petition (on page 10 and again on page 26), is a blatant misrepresentation of the record in this case. At the charge conference, the district judge included the special interrogatory because she believed that there was a "material issue of fact" on the timeliness question.

Conspicuously omitted from the Petition is any mention of Speacht's failure to properly object to the district court's proposed instruction on the special interrogatory as required by Rule 51 of the Federal Rules of Civil Procedure. The only objection raised by Speacht to the district court's proposed charge was as follows:

> I object generally to it because I don't believe there is a question of fact as to the statute of limitations. Then more specifically under the pattern jury instructions for Circuit [sic], the standard is knew or by the exercise of reasonable care

should have known that his position was being terminated.

In response to the only specific objection made by Speacht, the district court changed the language in the instruction to accommodate Plaintiff's objection (changing "knew" to "knew or should have known, using a reasonable amount of diligence"). At the conclusion of the trial, after both sides had rested, the district court again accommodated the only minor objection Speacht set forth (changing "onto disability retirement" to "onto long-term disability"). No other objection to the instruction was made by Speacht anywhere in the record, and no objection was ever made by Speacht to the district court's refusal to give Plaintiff's proposed instruction addressing the statute of limitations issue in general.

As stated in the Petition, the jury, at the conclusion of its deliberations, found as a fact, in response to the special interrogatory, that Speacht "knew or should have known" of any age discrimination against him on December 12, 1986. Since Speacht did not file his charge of discrimination with the EEOC until January 20, 1988, or some 389 days after the discriminatory occurrence as found by the jury, the district court found that his charge was untimely under Section 7(d) of the ADEA, 29 U.S.C. Section 626(d) and entered judgment for Mobil.

Speacht appealed the district court's judgment to the United States Court of Appeals for the Eleventh Circuit. The *only* issue asserted by Speacht before the appellate court was: "Whether the trial court erred in its instruction to the jury on whether the Appellant filed his pre-suit claim within the 300 day statutory limitation." In response, Mobil asserted *inter alia* before the court of appeals that Speacht had waived any objection to the in-

struction under Rule 51 of the Federal Rules of Civil Procedure, and further that the district court had not abused the wide discretion allowed it under Rule 49(b) of the Federal Rules of Civil Procedure in utilizing special interrogatories to resolve disputed issues of fact. On June 1, 1992, the Eleventh Circuit rendered an unpublished "per curiam: affirmed" decision.

## SUMMARY OF THE ARGUMENT

The second question presented for review in the Petition was neither raised before nor considered by the court of appeals, and cannot be raised for the first time before this Court. *Springfield v. Kibbe,* 480 U.S. 257, 259, 107 S. Ct. 1114, 1115 (1987); and *Tacon v. Arizona,* 410 U.S. 351, 352, 93 S. Ct. 998, 999 (1973). Additionally, the Petition is fundamentally flawed in that it makes unwarranted assumptions about the basis for the decision by the court of appeals, which was an unpublished "per curiam: affirmed" decision. It is just as likely that the basis for the appellate court's decision was that Petitioner waived any objection to the district court's jury instruction by not raising a proper objection as required by Rule 51 of the Federal Rules of Civil Procedure.

The Petition, although phrased in terms of whether the district court improperly placed the burden upon the plaintiff in instructing the jury on Mobil's statute of limitations defense, in actuality, is little more than an attempt to circumvent a factual finding by the jury in responding to a special interrogatory submitted by the district court pursuant to Rule 49(b) of the Federal Rules of Civil Procedure. Disturbing the jury's factual finding would violate the Seventh Amendment to the United States Constitution. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 358-59, 82 S. Ct. 780, 783 (1962). Finally,

Petitioner's alleged "conflict" among the circuits as to whether the plaintiff or the defendant has the burden of asserting an ADEA statute of limitations defense (i.e., whether a charge was timely filed pursuant to Section 7(d) of the Act) is an artificial conflict that does not exist. Accordingly, the Petition does not meet any of the requirements set forth in Rule 10 of the Rules of the Supreme Court, governing the guidelines for a Petition for Writ of Certiorari, and should be denied.

## ARGUMENT

### I. PETITIONER'S SECOND ISSUE, WHICH APPARENTLY PURPORTS TO BE A "CONTINUING VIOLATION" ARGUMENT, CANNOT BE RAISED FOR THE FIRST TIME BEFORE THIS COURT SINCE IT WAS NEITHER RAISED BEFORE NOR CONSIDERED BY THE COURT OF APPEALS.

In the second question presented for review in the Petition, Petitioner asserts what appears to be a "continuing violation" theory, i.e., that the statute of limitations could not bar his claim of constructive discharge, since an alleged "related act of discrimination" occurred less than 300 days before Speacht's discrimination charge was filed. This is an issue which Speacht is attempting to raise for the first time in this Court. As stated above, the *only* issue raised by Speacht before the court of appeals was an assertion that the district court erred in its instruction to the jury relating to the special interrogatory included in the verdict form, which was included so that the jury could resolve the factual question of when Speacht "knew or should have known" of the discriminatory conduct alleged in this case. As a general rule, this Court will not consider issues which were neither raised before nor considered by the court of appeals. See *United States v. Williams*, 504

U.S. ____, 112 S. Ct. 1755 (1992); *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999 (1973); and *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 147 n.2, 90 S. Ct. 1598, 1602-03 n.2 (1970); see also *Springfield v. Kibbe*, 480 U.S. 257, 259, 107 S. Ct. 1114, 1115 (1987) (where this Court reiterated that this rule had "special force" where the party seeking to raise the issue has failed to raise a proper objection to a jury instruction under Rule 51 of the Federal Rules of Civil Procedure). This Court has recognized a few limited exceptions to this principle, such as issues relating to federal subject matter jurisdiction, *Andrus v. Charlestone Products Co.*, 436 U.S. 604, 98 S. Ct. 2002 (1978); issues of appellate jurisdiction and whether a decision is appealable, *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S. Ct. 1202 (1976); or nonjurisdictional issues involving questions of great public importance and concern, *Connor v. Finch*, 431 U.S. 407, 97 S. Ct. 1828 (1977) (concerning reapportionment of congressional districts). However, none of these exceptions are even arguably aplicable to this case. Since Speacht's "continuing violation" issue was neither raised before nor considered by the court of appeals, it cannot be raised for the first time before this Court.

Of course, even if the issue could be properly raised, this Court rejected the "continuing violation" theory in similar circumstances in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498 (1980) (charge filing period under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.*, was triggered by notice to a university professor of the university's decision to deny him tenure, not the subsequent date that his employment actually was terminated); see also *Davidson v. Indiana - American Water Works*, 953 F.2d 1058 (7th Cir. 1992) (rejecting a continuing violation argument in a constructive discharge claim pursuant to the ADEA). Peti-

titioner may well be correct with respect to his assertion (Petition, p.22) that constructive discharge claims can be "particularly nebulous . . . in terms of specifying a single date upon which the discriminatory conduct occurred. . . ." However, this is precisely why the district court presented this factual issue to the jury via a special interrogatory, which allowed both sides a full opportunity to argue, on the basis of the evidence presented, as to when this event occurred.

## II. PETITIONER MAKES UNWARRANTED ASSUMPTIONS ABOUT THE BASIS FOR THE DECISION BY THE COURT OF APPEALS.

A fundamental flaw in the Petition is that it makes the quantum leap assumption that the Eleventh Circuit, in rendering its decision in this case, based its decision on the ground that the district court, through its jury instruction, shifted the burden of proof to the plaintiff on the statute of limitations question (although, as is set forth below, this is not what occurred before the district court). Speacht fails to point out in his Petition that one of the principal arguments raised by Mobil before the court of appeals was that Speacht had waived his objection to the district court's jury instruction by not raising a proper specific objection as required by Rule 51 of the Federal Rules of Civil Procedure. Indeed, a significant portion of the briefs and oral argument before the Eleventh Circuit was devoted to this issue. It is just as likely that the court of appeals summarily affirmed the district court's judgment because it agreed with Mobil's waiver argument under Rule 51; or the court of appeals may have believed that the district court did not abuse the wide discretion it is allowed in formulating special interrogatories (and related instructions) under Rule 49(b) of the Federal Rules of Civil Procedure. In either event, had the court of appeals determined that any

significant issues had been raised during the appeal of this case about the district court's judgment, surely it would have chosen to write an opinion explaining the precise basis for its decision.

## III. PETITIONER IS MERELY ATTEMPTING TO CIRCUMVENT A FACTUAL FINDING BY THE JURY IN CONTRAVENTION OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Although Speacht, in his Petition, goes to great lengths to argue that the district court's jury instruction improperly placed the burden of proof on the plaintiff with respect to the statute of limitations defense, this case boils down to frail attempt on Speacht's part to circumvent a factual finding by the jury in response to a special interrogatory. Speacht's entire argument throughout the appellate proceedings in this case has been based upon the supposition that the district court erroneously instructed the jury as to Mobil's "statute of limitations defense." This is a complete mischaracterization of what the district court either did or intended to do. The district court never intended to submit to the jury the issue of *law* of whether Mobil had sustained its statute of limitations defense. Rather, what the district court did do, was to submit to the jury a special interrogatory under Rule 49 of the Federal Rules of Civil Procedure for a *finding of fact.* Rule 49(b) expressly provides that a district court may combine "written interrogatories upon one or more *issues of fact*" with a general verdict (emphasis added). Rule 49 is intended to be a very flexible tool, and district courts traditionally have been accorded wide discretion in determining whether special interrogatories should be employed, and if so, how they should be framed. *Barton's Disposal Service, Inc. v. Tiger Corp.*, 886 F.2d 1430, 1434 (5th Cir. 1989); *Dreiling v.*

*General Electric Corp.*, 511 F.2d 768, 774 (5th Cir. 1975); *Peterson v. Peterson*, 400 F.2d 336, 343 (8th Cir. 1968); and *L'Urbaine Et La Seine v. Rodriguez*, 268 F.2d 1, 5 (5th Cir. 1959). Since the jury's finding in this case was one of fact (a finding that is also supported by overwhelming evidence in the record and which both sides had a full opportunity to argue to the jury as to how that factual issue should be resolved), under the Seventh Amendment to the United States Constitution, it cannot be disturbed. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59, 82 S. Ct. 780, 783 (1962).

## IV. THE CONFLICT IN CIRCUITS ASSERTED IN THE PETITION IS NON-EXISTENT AND, AT BEST, A FIGMENT OF PETITIONER'S VIVID IMAGINATION.

The principal ground asserted in support of the Petition herein is that the decision of the Eleventh Circuit below (whatever the basis for that decision may have been), is allegedly in conflict with a number of other circuits, and this Court is asked to resolve the "conflict" as to whether the plaintiff or the defendant has the burden of proving the statute of limitations defense under the ADEA (i.e., the timely filing of a charge pursuant to Section 7(d) of the Act). A careful examination of the cases cited for this proposition, however, reveals that, in reality, there is no conflict at all, but simply a clever attempt on the part of Petitioner to try to comply with Rule 10 of the Rules of the Supreme Court.

For instance, the string of cases cited on pages 24 and 25 of the Petition merely stand for the basic proposition that, in general, a statute of limitations is an affirmative defense within the meaning of Rule 8(c) of the

Federal Rules of Civil Procedure, that must either be pled as an affirmative defense in the defendant's answer or otherwise properly raised in the district court, and is subject to waiver if it is not properly preserved.[1] Most of the cases cited are not even employment discrimination cases, and only one of the cases cited is an ADEA case, *Heiar v. Crawford Co.*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500 (1985) (and this case did not address the charge-filing limitation, but the two year statute of limitations contained in the Act that was repealed by the Civil Rights Act of 1991). Two of the cases, *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515 (11th Cir. 1991) and *Hernandez v. Hill Country Telephone Cooperative, Inc.*, 849 F.2d 139 (5th Cir. 1988), did address the analogous charge-filing period pursuant to Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(e). Of course, in this case, Mobil specifically raised the charge-filing requirement as an affirmative defense, and has treated it as such throughout this litigation.

The cases cited by Petitioner which allegedly conflict with the above general proposition, in actuality, create no conflict at all. None of the cases cited are even employment discrimination cases, much less cases dealing with who has the burden of establishing that a charge was timely filed pursuant to Section 7(d) of the ADEA. *Lampliter Dinner Theater, Inc. v. Liberty Mutual Insurance Co.*, 792 F.2d 1036 (11th Cir. 1986) and *Grant v. Preferred Research, Inc.*, 885 F.2d 795 (11th Cir. 1989) both involved fraud claims under Alabama state law, and the only burden placed upon

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[1] Of course, Petitioner's argument that Mobil waived the statute of limitations defense, aside from the fact that this argument was not raised below, is utterly specious. Indeed, the Company raised this issue at every conceivable opportunity, including as an affirmative defense in its answer, by pretrial motion, as an issue in the joint pretrial stipulation, and during both trials in its motion for directed verdict.

the plaintiff in those cases was the issue of *tolling* the appropriate statute of limitations (i.e., when the plaintiff knew or should have known of the fraudulent conduct), not actually proving the statute of limitations defense. A similar ruling was reached in *Tagliente v. Himmer*, 949 F. 2d 1 (1st Cir. 1991) (which addressed the plaintiff's burden of tolling the statute of limitations in a fraud claim under Massachusetts law).

The only other case cited by Petitioner in support of his "conflict" argument is *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir. 1983). Again, this was not an ADEA case, but an action pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. Section 51 *et seq.* This case did place the burden upon the plaintiff to establish a timely filing in a FELA action under 45 U.S.C. Section 56. However, the precise basis for this ruling was that, in accordance with prior Fifth Circuit precedent under FELA, compliance with 45 U.S.C. Section 56 was deemed a "condition precedent to an injured employee's recovery in a FELA action," not an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. *Id.* at 1117. The court characterized the limitations period as a condition precedent under this particular statute because it not only barred "the claimant's remedy," but also destroyed "the employer's liability." *Id.* Whether *Emmons* was rightly or wrongly decided, it certainly creates no conflict with any other circuit authority as to who bears the burden of establishing that a charge was timely filed pursuant to Section 7(d) of the ADEA. As such, the Petition does not come close to meeting any of the criteria set forth in Rule 10 of the Rules of the Supreme Court as to the proper grounds for granting a Petition for Writ of Certiorari.

## CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent Mobil Chemical Co. respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be denied.

Respectfully submitted,

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